

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

WAYNE LEONARD STARKEY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13214
Trial Court No. 3AN-16-09342 CI

MEMORANDUM OPINION

No. 6868 — April 29, 2020

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael D. Corey, Judge.

Appearances: Jason A. Weiner, Gazewood & Weiner, P.C.,
Fairbanks, under contract with the Office of Public Advocacy,
Anchorage, for the Appellant. Matthias Cicotte, Assistant
Attorney General, Office of the Attorney General, Anchorage,
and Kevin G. Clarkson, Attorney General, Juneau, for the
Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,
Judges.

Judge ALLARD.

In February 2016, the Alaska Parole Board granted discretionary parole to Wayne Leonard Starkey. This grant was preconditioned on Starkey's completion of a substance abuse evaluation and any recommended substance abuse treatment. According

to the parole board's order, if Starkey satisfied the precondition, the grant of parole would become effective in October 2016.

In August 2016, Starkey asked the parole board to reconsider requiring this precondition. He explained that he was in protective custody after being assaulted and seriously injured by another inmate and that substance abuse treatment was not available to inmates in protective custody.

The parole board met in special session to consider Starkey's request for reconsideration. In a letter to Starkey, the parole board denied the request. The parole board explained that it had reviewed Starkey's entire file and criminal history and decided not to remove the substance abuse treatment precondition. The board wrote, "While we are sympathetic to your situation in protective custody, you need to have the tools necessary to ensure your addiction is under control."

In October 2016, Starkey filed an application for post-conviction relief in the superior court challenging the parole board's decision not to remove the precondition. He was appointed counsel, and his attorney filed an amended application for post-conviction relief in May 2017. In the amended application, Starkey's attorney argued that the parole board violated Starkey's right to substantive due process when it conditioned his grant of parole on a requirement that was not possible to meet. Starkey's attorney asked the court to order Starkey's immediate release on discretionary parole, with the condition that he obtain a new substance abuse assessment within thirty days of release and follow all recommendations.

While his application was pending, in July 2017, Starkey was released on mandatory parole. At an October 2017 hearing, the superior court ordered briefing on whether to dismiss Starkey's application for post-conviction relief as moot. Ultimately, in June 2018, the court issued an order deciding that Starkey's case fell within the public

interest exception to the mootness doctrine, but concluding that Starkey's application failed on the merits.¹

Starkey now appeals, arguing that the parole board abused its discretion when it declined to remove the precondition requiring substance abuse treatment. Starkey also contends that the precondition violated his constitutional rights to reformation and due process. For the reasons explained here, we find no merit to these claims.

Starkey's claim that the parole board abused its discretion when it refused to remove the precondition

The parole board has the authority to release a defendant on discretionary parole if it finds that (1) the prisoner will live and remain at liberty without violating any laws or conditions imposed by the board; (2) the prisoner's rehabilitation and reintegration into society will be furthered by release on parole; (3) the prisoner will not pose a threat of harm to the public if released on parole; and (4) release of the prisoner on parole would not diminish the seriousness of the crime.² The parole board also has the authority to impose preconditions to a defendant's release on discretionary parole when it finds that public safety cannot be met without that precondition.³

¹ Because Starkey's proposed remedy was limited to securing his release on discretionary parole, we question the superior court's finding that the public interest exception applied to this moot case. See *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) (citing *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1196 (Alaska 1995)) (discussing the factors a court must consider when deciding to apply the public interest exception to the mootness doctrine).

² AS 33.16.100(a); see also *Thomas v. State*, 413 P.3d 1207, 1212 (Alaska App. 2018).

³ 22 AAC 20.240.

In the current case, the parole board found that Starkey's substance abuse issues were significant enough that in-custody substance abuse treatment was required before Starkey could be safely released into the community.

On appeal, Starkey does not dispute that he has substance abuse issues; nor does he actually challenge the parole board's finding that public safety could not be achieved except through in-custody substance abuse treatment. Instead, Starkey argues that it violated due process to impose a precondition of in-custody substance abuse treatment when Starkey was in protective custody and unable to access such treatment. Starkey further argues that the remedy for this due process violation should have been removal of the precondition and immediate release on discretionary parole.

We find no merit to this claim. As an initial matter, we note that there is nothing in the record to suggest that the parole board was aware that the precondition could not be met at the time it was imposed. There is also nothing in the record to suggest that the precondition could not be met in the future, once Starkey was released from protective custody.

In any case, even assuming that the precondition was impossible for Starkey to meet, the appropriate remedy under these circumstances would not be to release Starkey on discretionary parole as he claims. As already noted, the parole board does not have the authority to release a person into the community on discretionary parole unless it finds that the person can safely live in the community and obey all laws and conditions imposed by the board. Here, the parole board found that Starkey could not be released until he had completed in-custody substance abuse treatment, and Starkey does not dispute that he has substance abuse issues and is in need of substance abuse treatment. Given these circumstances, we conclude that the parole board acted within its discretion to refuse to remove the precondition.

Starkey's claim that the Department of Corrections was obligated to provide in-custody substance abuse treatment to him while he was in protective custody

Starkey also argues that the Department of Corrections violated Article I, Section 12 of the Alaska Constitution because it did not provide him with substance abuse treatment while he was in protective custody.⁴ But there is no record that Starkey ever asked the Department of Corrections to provide him with in-custody substance abuse treatment. Instead, Starkey asked the parole board to remove the substance abuse precondition and to release him — untreated — into the community.

The proper forum for litigating claims related to a defendant's right to rehabilitative services is through a separate civil action.⁵ We note that Starkey had standing to bring such a claim even without the imposition of the discretionary parole precondition, although the precondition made clear that the parole board viewed Starkey as a defendant who required in-custody substance abuse treatment in order to be rehabilitated. In other words, if Starkey had been interested in obtaining in-custody substance abuse treatment while in protective custody, there was an avenue for relief that he could have followed.

Conclusion

For the foregoing reasons, we AFFIRM the superior court's order denying Starkey's application for post-conviction relief.

⁴ See *Abraham v. State*, 585 P.2d 526, 530-33 (Alaska 1978).

⁵ See *State, Dep't of Corr. v. Lundy*, 188 P.3d 692, 694-95 (Alaska App. 2008) (citing *Hertz v. State*, 81 P.3d 1011, 1014 (Alaska App. 2004)); see also *Abraham*, 585 P.2d at 533-34; *Rust v. State*, 584 P.2d 38, 39 (Alaska 1978).